

Decision DRAFT DECISION OF ALJ BEMESDERFER (Mailed 3/7/2006)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Pacific Bell Telephone Company (U 1001 C) for Authority Pursuant to Section 851 of the California Public Utilities Code to Sell Real Property Located at 470 West Portal Avenue, San Francisco, California.

Application 05-12-022  
(Filed December 21, 2005)

**OPINION GRANTING APPLICATION**

**Summary**

In this decision, we confirm that Pacific Bell Telephone Company (SBC California or Applicant) may sell its former operator services building located at 470 West Portal Avenue, San Francisco (the building together with the real property on which it stands are hereinafter referred to as the Facility), to the San Francisco Waldorf School (Buyer) pursuant to Pub. Util. Code § 851. We further approve of the allocation of 50% of the gain on sale of the land to ratepayers and 100% of any gain on the sale of the remainder of the Facility to the shareholders of SBC California.

**Background**

SBC California has owned the land portion of the Facility since 1971. It constructed the building shortly after purchasing the land and operated the Facility as an operator services facility from completion of construction through April 2005, at which time it was permanently closed. There are presently no employees on site and SBC California foresees no need for the Facility in the future. A small portion of the building houses equipment necessary to provide

voice/DSL services, alarm circuits and DS-1 services to nearby customers. That equipment is being relocated to an underground vault (the Vault) located at the extreme southeast corner of the lot on which the building is located.

SBC California will have access to the Vault via a permanent exclusive easement (the Easement). With the exception of the Easement and the Vault, SBC California has no further use for the Facility.

Buyer is a California non-profit public benefit corporation that provides education for children from kindergarten through 12<sup>th</sup> grade and an early childhood education program for younger children. These programs are currently offered at two different locations in San Francisco. Upon completion of the sale, Buyer's high school programs will be relocated to the Facility from their present location.

The Facility consists of a 22,863 square foot two-story office building on a 76,063 square foot lot. The Vault is a 240 square foot underground room accessible through a ground level hatch. PG&E will provide electrical service directly to the Vault, not through the building. The Easement covers 2,772 square feet of the lot. It allows SBC California access to the Vault twenty-four hours a day, seven days a week. The Easement is 60 feet long by 40 feet wide at its shortest length and width and contains adequate space for future expansion of the Vault. The Buyer's use of the Facility will not interfere in any way with SBC California's operation and maintenance of the equipment in the Vault, including any future expansion.

The purchase price for the Facility is \$6,000,000. The historical cost of the Facility was \$4,057,128 and its net book cost is \$2,562,225.

On January 10, 2006, the assigned Administrative Law Judge (ALJ) directed the Applicant to supplement the application with a discussion of the

proposed treatment of any gain on sale resulting from the proposed disposition. On January 13, 2006, the Applicant responded that gain on sale would be accounted for in accordance with an existing settlement between itself and the Division of Ratepayer Advocates (DRA) in Decision (D.) 94-06-011.

On January 24, 2006, the Applicant withdrew its request to keep the purchase price of the Facility confidential. On the same day, DRA protested the application.

## **Discussion**

### **Applicability of Section 851 to this Transaction**

Pub. Util. Code § 851 distinguishes between dispositions by a regulated utility of property that is necessary or useful to the utility in the performance of its duties to the public and property that is not necessary or useful in the performance of those duties.<sup>1</sup> A utility may not dispose of necessary or useful property without an order from this Commission authorizing the disposition but may dispose of other property without such an order. In this specific disposition, SBC California is retaining an easement interest in the property for continuing utility purposes.

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<sup>1</sup> "No public utility . . . shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its . . . plant, system or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it to do so. Every such sale, lease assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. Nothing in this section shall prevent the sale, lease encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value . . . "

**Treatment of the Gain on Sale**

SBC California will realize a gain upon completion of the sale. Although the Facility was acquired and constructed at a time when SBC California was a traditional cost-of-service utility, for the past 16 years (the NRF period), SBC California has been subject to the New Regulatory Framework (NRF) which largely substitutes market-based risks and rewards for the authorized returns of a traditionally regulated utility. For utilities that remain under traditional cost-of-service regulation, we have a proceeding in progress to develop a methodology for allocating gains on sale between shareholders and ratepayers. For such utilities, our traditional practice has been to split gains on sale between shareholders and ratepayers on a case-by-case basis.

With NRF utilities, the situation is different. There is no guaranteed return on investment. Shareholders put up the funds necessary to build, maintain and operate the utility's physical plant. Shareholders bear the risks of obsolescence, competition, natural disasters, etc. and are entitled to the rewards of their risk-taking. How to account for gains on sale of no longer useful property by NRF utilities is one of the subjects of another current rulemaking proceeding (R.05-04-005) in which we are considering the future regulation of telecommunications utilities.

In the specific case of SBC California, pursuant to a settlement agreement between Pacific Bell and the DRA adopted by the Commission in D.94-06-011, 50% of the gain on sale of the land portion of the Facility should be allocated to ratepayers and fifty percent to SBC California shareholders. *In the Matter of the Application of Pacific Bell for Review of the Regulatory Framework Adopted in Decision 89-10-031*, D.94-06-011, 55 CPUC 2d 1, 44-45, 65, 1994 Cal. PUC LEXIS 456, at \*116-22 (June 8, 1994). The gain on sale of the rest of the Facility should be

allocated one hundred percent to shareholders. *In the Matter of the Application of Citizens Telecomm. Co. of California and GTE California, Inc. for Authority and Approval under Pub. Util. Code Sections 851 and 854 for GTEC to Sell and Transfer Assets to CTC-California*, D.01-06-007, *mimeo*, at 878-89, 2001 Cal. PUC 390, at \*150-153 (June 7, 2001).

In its Opening Comments in R.05-04-005, SBC California has proposed eliminating the 50-50 split on land sale gains and assigning 100% of such gains to shareholders. Pending the outcome of that rulemaking, the allocation required by the 1994 settlement agreement remains in place and will be applied in this proceeding.

### **The DRA Protest**

The DRA protest raised five questions:

1. How is the gain on sale to be treated?
2. What is the market value of the property?
3. How does SBC California propose to treat the transaction for tax purposes?
4. Does this transaction represent an act of charitable giving by SBC California?
5. How are the costs for the easements and the Vault to be treated?

The question regarding treatment of gain on sale is mooted by the Applicant's January 13<sup>th</sup> response to the ALJ's ruling.

To ensure that ratepayers receive the full benefit of the land sale, in complying with the settlement approved in D.94-06-011 SBC California shall calculate the gain on sale of the land parcel by subtracting the historic cost of the land parcel from the fair market value of the land parcel at the time of sale. The gain sharing calculation shall be supported by an appraisal or other proof of the current market value of the land parcel.

Because the balance of the sale proceeds go entirely to the shareholders, it is unnecessary to inquire about the tax treatment of that portion of the sale or whether it constitutes an act of charitable giving.

With regard to treatment of the costs for the Easement and the Vault, the application recites that the cost of the Easement to SBC California is zero. The application also recites that SBC California is constructing and provisioning the Vault to continue providing services currently provided from a space within the building. SBC California should account for these costs as it accounts for similar costs of providing service to its customers.

### **Categorization and Need for Hearing**

In Resolution ALJ 176-3165, dated January 12, 2006, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a ratesetting proceeding and that hearings are not necessary.

### **Comments on Draft Decision**

The draft decision of ALJ Karl J. Bemesderfer in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. No comments were filed.

### **Assignment of Proceeding**

John Bohn is the Assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. With the exception of the Easement and Vault, the Facility is no longer necessary or useful to SBC California.

2. Sale of the Facility and retention of the Easement and the Vault will not interfere with SBC California's provision of telecommunications services to the public.

3. SBC California will realize a gain on sale of the Facility.

### **Conclusions of Law**

1. Pursuant to the Settlement Agreement between SBC California and the Division of Ratepayer Advocates adopted in D.94-06-011, 50% of the gain on sale of the land portion of the Facility should be allocated to ratepayers and 50% to shareholders.

2. Pursuant to D.01-06-007, 100% of the gain on sale of the building portion of the Facility should be allocated to shareholders.

### **O R D E R**

#### **IT IS ORDERED** that:

1. Pacific Bell Telephone Company (SBC California) is authorized to sell its former operator services facility at 470 West Portal Avenue, San Francisco, to the San Francisco Waldorf School.

2. Gain on sale of the above-described property shall be allocated between ratepayers and shareholders as set forth above.

3. SBC California shall calculate the gain on sale of the land parcel by subtracting the historic cost of the land parcel from the fair market value of the land parcel at the time of sale. The gain sharing calculation shall be supported by an appraisal or other proof of the current market value of the land parcel.

4. Application 05-12-022 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.